MALAYSIAN ARMED FORCES CO-OPERATIVE HOUSING SOCIETY LTD. v. NANYANG DEVELOPMENT (1966) SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) February 21, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 148 of 1975]

Contract — Building Contract — Construction of — Cost of laying water mains and of electric supply and metering.

This was an appeal from the decision of the High Court which had decided that the appellant society was liable to pay for the cost of laying water mains and of laying electricity wires along the roads leading to the various houses bought by the society from the respondents. An article in the building agreement provided that all costs of making water and electricity connections "inclusive of the cost of laying water mains and of electric supply and metering thereof" were to be borne and paid by the purchaser.

Held, dismissing the appeal: although it is acknowledged that when a person buys a house on a housing estate it is for the developer to pay for the cost of laying water mains and electric wires along the roads in the estate, here it had been agreed that the purchaser should pay for the cost of laying water mains and of electric supply and the metering thereof and therefore the learned trial judge was right in holding that it was the appellant society's responsibility to pay for them.

The following authorities were cited in argument: *Prenn* v. *Simmonds* [1971] 3 All E.R. 237 H.L. 241; *Commissioners of Customs and Excise* v. *Savoy Hotel, Ltd.* [1966] 2 All E.R. 299; *East Ham Borough Council* v. *Bernard Sunley & Sons, Ltd.* [1965] 1 All E.R. 210, 219 G3 to H4; *The North Eastern Railway Company* v. *Lord Hastings* [1900] A.C. 260, 267; *Glynn & Ors.* v. *Margetson & Co. & Ors.* [1893] A.C. 351, 357; *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1966] 2 W.L.R. 944, 986 B3; *Sze Hai Tong Bank* v. *Rambler Cycle Co. Ltd.* [1959] A.C. 576, 587; [1959] M.L.J. 200, P.C.; *River Wear Commissioners* v. *William Adamson & Ors.* (1876-7) 2 App. Cas. 743, 763; *Butterley Co. Ltd.* v. *New Hucknall Colliery* Co. Ltd. [1910] A.C. 381, 382; *Stroud's* Judicial Dictionary on "include", vol. 3, 4th edition p. 1333-4; 76 L.Q.R. 521; *Hillas & Co. Ltd.* v. *Arcos, Ltd. H.L.* [1932] All E.R. 494; *Foley* v. *Classique Coaches, Ltd.* [1934] 2 K.B. 1; *Chitty* on Contract, 23rd edition, p. 44, para. 84.

FEDERAL COURT.

Raja Abdul Aziz for the appellant.

Ronald T. S. Khoo for the respondent.

Suffian L.P. (read by Wan Suleiman F.J.): The defendant is a housing developer and the plaintiff a housing co-operative society. The defendant had a large piece of land in Gombak and another in Ampang which it wished to develop as housing estates. The plaintiff had a large sum of money made available by Government and with that money it bought houses from the defendant, for the society's members who are officers and men of the armed forces. It agreed to buy 117 units (i.e. about one-third of the houses to be built by the defendant in Gombak) and 65 units (i.e. about half of those in Ampang). The society entered into several agreements with the developer for this purpose, and it was agreed between them that the society pay some money in advance. There were disputes between the society and the developer, and the society sued the developer. The main dispute between the parties has been settled out of court, and here we are concerned only with the developer's counterclaim against the society. The developer won part of its counterclaim and lost part. As regards the part that it won, the society has appealed to us. So the dispute between them has been greatly narrowed down.

It turns on the construction of article 8 of the two main written agreements between them. The article is identical in terms and provides as follows:—

"The company [meaning the developer] further undertakes to apply on behalf of the purchaser for the connection to the said houses [i.e. those to be bought from the developer] of such water and electrical services as are provided by the local authority, but all costs of the making of such connections *inclusive of the cost of laying water mains and of electric supply and metering thereof* shall be borne and paid by the purchaser."

Because of the words italicized, as regards water supply it was submitted on behalf of the developer that under clause 8 the society must pay the cost of bringing and constructing a water reticulation system which connects the houses to the waterworks provided by the local authority and that as regards the Gombak lands which required the construction of a pump house and an elevated tank the society must also pay for such construction.

As regards electricity supply, the developer had to build a power substation, and it submitted that the society must under the agreements pay for that also.

The learned trial judge disallowed the developer's counterclaim as regards the cost of the pump house, elevated water tank and that of the power substation. There is no appeal against this part of his decision.

This appeal is only against that part of his decision whereby he allowed the developer's counterclaim that the society pay not only the cost of connecting the water main and electricity supply from the road to each house (as to which there is no dispute) but also the cost of laying water mains and of laying electricity wires along the roads leading to the various houses, as shown on the plans at pages 56 and 57 of the appeal record, which cost we are told from the bar comes to about $100,000.

The issue may thus be stated as follows: should the society pay for connecting the water and electricity supply to these houses, up to the lot boundaries only (as contended by the society) or should it pay also for laying water mains and electricity wires along the roads leading to these houses (as contended and successfully by the developer)? In fairness it should be stated that Mr. Khoo for the developer stated from the bar without contradiction that it did not expect the society to pay for laying water mains and electricity wires for the entire housing estate in the two areas, but only for doing so along the roads serving the houses sold to the society.

It is common ground that in construing clause 8 regard should be had to the whole agreement and during the course of argument reference was made to other clauses which it is convenient to reproduce now. These other clauses read as follows:

"Clause 1.

The Company will sell and the Purchaser will buy all those one hundred and seventeen lots outlined in brown and coloured red on the Layout Plan and thereon identified by numbers, which numbers are also set out in Column 1 of Schedule 'B' hereto, each lot to be of the area shown opposite it in Column 2 of Schedule 'B' making a total area of 206,166 square feet TOGETHER with the said houses to be built thereon (which said Lots and the said houses are hereinafter together referred to as 'the said Property') free from incumbrances at a price of Dollars one million five hundred

and sixty-four thousand five hundred and fifty ($1,564,550) (hereinafter called 'the total Purchase Price') being the *total* of the purchase prices of each of the said Lots as shown in Column 7 of Schedule 'B'."

"Clause 2

(a) Subject to the provisions of paragraph (b) the total Purchase Price for the said Property shall be paid by the Purchaser to the Company by instalments in the manner following, that is to say —

(i) Upon the execution of this Agreement the sum of $176,800 being the total of the deposit amount for each of the said Lots as specified in Column 3 of Schedule 'B' hereto (the receipt of which the Company hereby acknowledges).

(ii) Upon commencement of building construction of the said houses or any of them, a sum equal to the total sum payable as specified in Column 4 of Schedule 'B' hereto in respect of each of such houses upon which building construction has begun.

(iii) Upon construction of the said houses or any of them reaching roof level a sum equal to the total sum payable as specified in Column 5 of Schedule 'B' hereto in respect of each of such houses reaching the aforesaid stage of construction.

(iv) Upon completion of building construction the said houses or any of them, a sum equal to the total sum payable as specified in Column 6 of Schedule 'B' hereto in respect of each such house so completed. (This at page 72 of the appeal record mentions the '*total* purchase price' of each house)."

"Clause 4

... The said Lots have been staked out in accordance with the Layout Plan and have been open to the inspection of the Purchaser and if the position, measurements, boundaries and area of the said Lots as shown on the Layout Plan shall be different from its measurements, boundaries and area as stated or shown on the new document of title to the said Lots when issued, no such discrepancy or inaccuracy shall annul the sale or be the subject of any claim for damages or compensation or adjustment of the *total* Purchase Price on either side."

"Clause 5

The Company undertakes that the said Lots are sold and that all other lots shown on the Layout Plan are also sold TOGETHER with the free right and liberty for the Purchaser its successors and assigns and its and their servants agents licensees and invitees in common with the Company and all persons having the like right and liberty with or without vehicles at all times and for all purposes whatsoever connected with the use and enjoyment of the said Lots or other lots shown on the Layout Plan to pass and repass along over and upon all roads shown on the Layout Plan TOGETHER also with the full right and liberty to make all necessary connections and thereafter to use in a proper manner the drains sewers pipes cables or wires laid or constructed by the Company under or over the said roads for the purpose of the supply of water electricity and telephone services to and for drainage of water and sewage from the said Lots RESERVING NEVERTHELESS to the Company and all others to whom the Company may grant or have already granted the same or similar rights of way and drainage and of making connections as aforesaid the right to construct lay and use any drains sewers pipes and cables or wires over or under the said roads of the said Lots which the Company or such others may consider necessary for the purpose of serving other buildings erected or to be erected on other lots shown on the Layout Plan and to make all necessary connections thereto."

"Clause 9

The Company shall at its own cost and expense construct and make up approach roads and drains in accordance with the requirements of the local authority and shall do everything possible to have the same taken over and adopted by the local authority but until they are so taken over and adopted the Purchaser shall from time to time contribute a fair and rateable proportion of the cost and expense of their maintenance and repair such apportionment to be made by the Company's surveyor and to be accepted as final and binding by the Purchaser."

"Clause 12

Possession of each of the said houses will be given to the Purchaser on completion of the building construction thereof and upon the Purchaser having duly paid to the Company all moneys equal to the full value of such houses and the Purchaser having duly complied with the terms and covenants on its part to be observed in this Agreement."

It is argued on behalf of the society that it was not just buying land but that it was buying developed land and at prices comparable to and in some cases more than those usually paid for developed land in Kuala Lumpur; that when you buy developed land it is the developer's responsibility to pay for what is known as infrastructure, i.e. for roads, culverts, water mains, etc.; that the clauses fixing the price of these lands and the houses to be built on each individual lot and the method of paying for them show the total price to be paid for each house and that the society is liable to pay only this total price as well as the cost of laying water pipes and electric wires connecting each house to the mains on the road immediately outside the boundary of each individual lot. In particular the society draws attention to clause 1 which speaks of the "total of the purchase prices" of the property, clause 2(iv) of the "total purchase price" of each individual house, clause 4 of "the total purchase price" and clause 12 which says that possession of each house was to be given to the society on the society having paid to the developer "all moneys equal to the full value of such houses".

It is argued on behalf of the society that when the factual background and the main purpose of these agreements are looked at it is quite clear that the intention of the parties is that the developer was to pay for these disputed items.

It is argued on behalf of the society that clause 8 comes into play only if the developer applies on behalf of the society for water and electricity to be connected to the houses, whereupon the society is bound to reimburse the developer the cost incurred *vis-a-vis the local authority*, that if the developer does not so apply there is nothing for the society to reimburse; and that in either event the cost of laying water mains and erecting electricity wires along the road is the responsibility of the developer, not the society.

With all due respect I do not agree. I am of the opinion that the learned trial judge was right in holding that it is the society's responsibility to pay for these disputed items. It is acknowledged that when a person buys a house on a housing estate it is for the developer to pay for them, but here we have in clause 8 the words "inclusive of the cost of laying water mains and of electric supply and metering thereof", which I have underlined in the clause reproduced above. The words "water mains" do not mean the same thing as water pipes. The word "main" means according to the Shorter Oxford Dictionary "a *principal* channel, duct or conductor for conveying water, sewage, gas or electricity, e.g. *along the street* of a town," so that the use of the words "water mains" in clause 8 must in my opinion mean that the society accepted responsibility for paying the cost of laying the main water pipes along the streets which these houses front. The

use of the words "and of electricity supply and the metering thereof" immediately after the words "water mains" must in my opinion mean that under the agreement the society is also responsible for paying the cost of laying electric wires along the roads leading to these houses.

Giving clause 8 this construction does not in my opinion do violence to its language, for the transaction between the society and developer is an unusual one. The society is not like an ordinary purchaser who buys a single house; on the contrary it bought in bulk and in the circumstances it is not altogether unexpected that the agreement is so worded as to make the cost of these disputed items the society's responsibility rather than the developer's.

I would therefore dismiss this appeal with costs.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Rithauddeen & Aziz; Shearn Delamore & Co.*

BEE CHUAN RUBBER FACTORY SDN. BHD. v. LOO SAM MOI

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) March 11, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 125 of 1975]

Contract — Building contract — Whether time essence of contract — Damages for delay in completion of building — Counterclaim — Courts.

This was an appeal from the decision of Wan Suleiman F.J. The action arose out of an agreement in writing whereby the appellants agreed to sell to the respondent a piece of land in Seremban and to build for her a house thereon. There was delay in the completion of the contract and the learned trial judge found that the parties had by their conduct allowed the date for completion to pass. However the respondent had by letter dated August 21, 1970 given the appellants one month to carry out the contract. The learned trial judge held that this letter made time again the essence of the contract and as the respondent was not given possession of the house till April 4, 1975 he gave judgment for the respondent for damages at the rate of $100 a month from September 21, 1970 to April 3, 1975. The learned judge who allowed part of the appellant's counterclaim that is for $850 for extra work gave costs to them on the counterclaim. The appellants appealed and the respondent cross-appealed on the costs awarded on the counterclaim.

Held, dismissing the appeal and cross-appeal: (1) the learned trial judge was correct in giving judgment for damages for the respondent;

(2) Damages recoverable for breach of contract for delay in the completion of an ordinary dwelling house required for personal occupation, include the reasonable cost of living accommodation or living elsewhere if such expenses were in fact incurred. In the present case the respondent gave evidence which was not challenged that she paid rent at $100 for her living accommodation. The learned judge was therefore quite right in awarding her damages at $100 per mensem for the relevant period;

(3) as the appellants were partially successful on the counterclaim, the court would not interfere with the learned judge's order as to costs on the counterclaim.

Cases referred to:-

(1) *Wong Kup Sing* v. *Jeram Rubber Estates Ltd.* [1969] 1 M.L.J. 245.

(2) *Ismail bin Haji Embong* v. *Lau Kong Han* [1970] 2 M.L.J. 213.

(3) *Koh Shey Guan* v. *Lee Kok Chan* [1971] 1 M.L.J. 79.

(4) *Haji Hasnan* v. *Tan Ah Kian* [1963] M.L.J. 175.

(5) *Hadley* v. *Baxendale* (1854) 9 Exch. 341.

(6) *Bow* v. *McGrath Builders* [1974] N.Z.L.R. 442.

FEDERAL COURT.

S. Periasamy for the appellants.

Gurdial Bakan Singh for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal by the defendants in the action from the judgment of Wan Suleiman F.J. sitting as a High Court Judge, and there was a cross-appeal by the respondent, plaintiff in the action.

The action arose out of an agreement in writing whereby the defendants agreed to sell to the plaintiff a piece of land in Seremban for $4,000 and to build for her a house thereon for the price of $12,500.

As provided in the agreement, the plaintiff paid $3,000 on the date of the agreement. As to the balance of the purchase price for the land and the house, the defendants undertook to obtain for the plaintiff a loan of $10,500 from the Malaya Borneo Building Society, Kuala Lumpur, and the plaintiff was to pay the remaining $3,000 by two instalments of $1,500 each, the first to be paid when the foundation for the construction of the house was made and the second when the house reached roof level.

It was also agreed between the parties that upon the title to the land being issued by the appropriate authority, the defendants would execute a transfer of the land in favour of the plaintiff who would then execute a charge over the land in favour of the society and authorise the society to pay the loan amount to the defendants. The plaintiff created a charge in favour of the society on June 23, 1969 and authorised the payment of the amount of the loan to the defendants.

By mutual agreement between the parties the method of payment by the plaintiff of the sum of $3,000 by instalments was varied. The result of the variation was that the plaintiff paid $500 on December 2, 1968, $500 on December 19, 1968, $500 on January 13, 1969, $1,000 on April 24, 1969 and $500 on August 4, 1969.

By clause 5 of the agreement, it was expressly agreed that the house shall be completed and certified fit for occupation and possession by the plaintiff on June 15, 1968. Clause 12 of the agreement stipulated that time shall be of the essence of the contract. By a letter dated December 24, 1968, which was more than 6 months after the agreed date of the handing over of the completed house to her, the plaintiff asked the defendants to make what she called a minor amendment to the building plan of the house. The amended plan was approved only on May 6, 1969.

The building reached roof level in April 1969 by which time, as stated earlier, the plaintiff had paid only $1,500 so that there was still a balance of $1,500 to be paid. When asked to pay this sum she asked for time, and, as I have stated earlier, this sum was